

RAVICHANTHIRAN GANESAN

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v.

PERCETAKAN WAWASAN MAJU SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR

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RAMLY ALI J

[ORIGINATING SUMMONS NO: D5-24-177-2007]

29 MAY 2008

COMPANY LAW: *Directors - Fiduciary duties - EPF contributions - Whether plaintiff in law a director in accordance with ss. 4 & 122 Companies Act 1965 - Whether plaintiff's responsibility and fiduciary duty to ensure payments of EPF contributions - Whether second defendant played a controlling role in the first defendant company - Whether second defendant as shareholder bore responsibility towards payment of EPF contributions - Whether second defendant had made a misrepresentation regarding outstanding balance of EPF contributions - Right of bringing action against plaintiff initiated by third defendant (EPF) and not as a result of second defendant's actions/representation - Whether plaintiff suffered loss of reputation - Whether plaintiff's claim against second defendant dismissed - Whether plaintiff suffered losses and entitled to damages*

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CIVIL PROCEDURE: *Parties - Claim for damages - Suit against first and second defendant - Misrepresentation and failure to pay EPF contributions - Whether plaintiff in law a director in accordance with ss. 4 & 122 Companies Act 1965 - Whether plaintiff's responsibility and fiduciary duty to ensure payments of EPF contributions - Whether second defendant played a controlling role in the first defendant company - Whether second defendant as shareholder bore responsibility towards payment of EPF contributions - Whether second defendant had made a misrepresentation regarding outstanding balance of EPF contributions - Right of bringing action against plaintiff initiated by third defendant (EPF) and not as a result of second defendant's actions/representation - Whether plaintiff's reputation affected - Whether plaintiff's claim against second defendant dismissed - Whether plaintiff suffered losses and entitled to damages*

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The plaintiff herein was seeking declarations, amongst others, and in particular against the first and second defendant for damages as a result for the misrepresentation and for failure to pay EPF contributions for the employees of the first defendant. The plaintiff had filed this suit stating (a) the plaintiff was at all material times

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- A a non-executive director of the first defendant; (b) that the second defendant was a de facto director of the first defendant; (c) that the first and second defendant had misrepresented to the plaintiff the actual balance owing for the Employee Provident Fund ('EPF'); (d) that the first and second defendant had not taken the appropriate steps/measures to pay the EPF contributions for the employees of the first defendant and (e) as a result of the said misrepresentation the plaintiff's good name and reputation had been tarnished. The basis of the plaintiff's claim herein was that, at all material time, he was just a non-executive director of the first defendant and as such he was not responsible to pay EPF contributions for the employees of the first defendant.

Held (dismissing plaintiff's claim):

- D (1) The plaintiff was in law a director of the first defendant in accordance with the definition of the word 'director' in s. 4 as well as s. 122 of the Companies Act 1965. From documentary evidence, it was axiomatic that the plaintiff had voluntarily offered himself to be a director of the first defendant and had even procured steps to push/expedite for an extraordinary general meeting so as to enable the plaintiff to be appointed to the board of directors. There was not a shred of evidence adduced by the plaintiff to show that the plaintiff was appointed as a non-executive director in the first defendant company to protect the interest of the second defendant. Hence if the plaintiff was to be remunerated in his capacity as a director, then it was only fair and reasonable for him to assume and undertake the responsibilities attached to the said position, as a director of the first defendant company. It was the plaintiff's responsibility and fiduciary duty to ensure payments of EPF contributions and to exercise reasonable diligence, whether he was actually involved or not with the first defendant's affairs as he had a statutory duty to do so. (paras 8 & 14)
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- H (2) The plaintiff had not adduced any evidence to show that the second defendant had played a controlling or commanding role in the first defendant company, thereby failing to discharge the burden of proof lay on him (s. 101 Evidence Act 1950). The second defendant was in fact only elected to chair the meeting on the invitation and appointment from the board of directors. A single meeting if chaired by the second defendant did not
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automatically make the second defendant a chairman in perpetuity. A chairman of a meeting was different from a chairman of the company. (paras 23 & 26)

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- (3) The plaintiff had failed to specify and plead clearly whether the second defendant had made a fraudulent, negligent or innocent misrepresentation. To succeed in establishing fraudulent misrepresentation, it was incumbent on the plaintiff to prove the same beyond reasonable doubt, such prove which had not been forthcoming or even present by any standards based on the affidavits filed herein. The second defendant was not making any representation whatsoever regarding the outstanding balance of the EPF contributions and this was clearly understood by the plaintiff. The plaintiff had accepted the fact that the second defendant was advised by one Kwoo Swee Tiong and it was not the second defendant that made any representation on his own accord as to any fact, opinion or even expression. Moreover, the second defendant could not be said to have misrepresented that the sum owing was RM160 in respect of EPF contributions as the EPF letter (exh. P6) had confirmed that the said sum was in fact the true and accurate sum outstanding. Whilst the plaintiff had alleged misrepresentation, it had not been stated as to what extent the plaintiff had relied and acted on the said statement and suffered losses as a result of the alleged statement. Hence, the plaintiff was not entitled to damages. (paras 36, 41 & 44)

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- (4) The right of bringing an action against the plaintiff was initiated by the third defendant (EPF) and was not as a result of the second defendant's actions and/or representation. Sections 65 and 67 of the Employees Provident Fund Act 1991 clearly stipulates that the right is with the EPF board. Hence, whatever action brought by the EPF under its mistaken belief could not be put on the shoulders of the second defendant as the second defendant had no right by any measure to direct and control the actions undertaken by the EPF. Furthermore, s. 46 of the same Act provides for the EPF to initiate action against the plaintiff as the plaintiff was in fact a director of the first defendant. Sections 40, 41, 42 and 43 of the Employees Provident Fund Act 1991 stipulates that the responsibility of EPF contributions is on the employer, in this case being the company. Hence, the plaintiff's assertion

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- A and demand that the second defendant should pay the EPF contribution was without basis and wholly unsustainable. The second defendant was only a shareholder and hence bore no responsibility towards payment of EPF contributions. (paras 45 & 47)
- B (5) The plaintiff whilst claiming for damages for loss of reputation had failed to specify as to what damages was being sought. Furthermore, the plaintiff had not demonstrated or adduced any proof to this court as to how the plaintiff's reputation had
- C been affected as a result of the suit or action brought about wholly by the third defendant (EPF) own initiation. Further, the plaintiff had failed to adduce any evidence as to how he had suffered any pecuniary loss. The plaintiff had also failed to show, put forward evidence or even indicate the difference
- D between his present reputation and that of his reputation prior to the said suit commenced by the third defendant (EPF) against him. The plaintiff had failed to prove his claim against the second defendant. Therefore, the plaintiff's claim against the second defendant was dismissed. (paras 57 & 60)
- E **Case(s) referred to:**
Abdul Mohd Khalid Hj Ali & Ors v. Dato' Hj Mustapha Kamal & Anor [2003] 5 CLJ 85 HC (**refd**)
CCA Holdings Ltd v. Palm Resort Bhd [1998] 4 CLJ 440 HC (**refd**)
Electro Cad Australia Pty Ltd & Ors v. Mejati RCS Sdn Bhd & Ors [1998] 3 CLJ Supp 196 HC (**refd**)
- F *Hasnul Abdul Hadi v. Bulat Mohamed & Anor* [1977] 3 LNS 2 (**refd**)
Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA (**refd**)
Lee Cheong Fah v. Soo Man Yoh [1996] 2 BLJ 356 HC (**refd**)
- G *Lembaga Kemajuan Wang Simpanan Pekerja v. Rubfil Sdn Bhd & Ors* [2005] 1 LNS 369 (**refd**)
Low Keang Guan v. Sip Heap Lee-Marubeni Sdn Bhd [2005] 1 LNS 289 (**refd**)
Ng Pak Cheong v. Global insurance Co Sdn Bhd [1995] 1 CLJ 223 HC (**refd**)
- H *Quah Poh Hoe Peter v. Probo Pacific Leasing Pte Ltd* [1993] 1 SLR 14 (**refd**)
Patrick Lee Pac v. Gaelic Inns Pte Ltd [2007] SGCA 41 (**refd**)
Re a Company (No 005009 of 1987) ex parte Copp and Another [1989] BCLC 13 (**refd**)
Re Barings plc (No 5) [2000] 1 BCLC 523 (**refd**)
- I *Re Forest of Dean Coal Mining Corp Co* [1879] 10 Ch D 450 (**refd**)
Re Hydrodom (Corby) Ltd [1994] 2 BCLC 180 (**refd**)
Re Lo-Line Electric Motors Ltd [1988] BCLC 698 (**refd**)

- Re Unisoft Group Ltd (No 3)* [1994] BCLC 609 (**refd**) A
Salomon v. A Salomon & Co Ltd [1897] AC 22 (**refd**)
Secretary of State for Trade and Industry v. Deverell & Another [2001] Ch 340 (**refd**)
Sim Thong Realty Sdn Bhd v. The Kim Dar [2003] 3 CLJ 227 CA (**refd**)
Tan Kwor Ham & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja [2005] 8 CLJ 676 HC (**refd**) B
Tay Tho Bok & Anor v. Segar Oil Palm Estate Sdn Bhd [1996] 1 LNS 60 (**refd**)
Teoh Peng Phe v. Wan & Co [2001] 5 CLJ 222 HC (**refd**)
Travelsight (M) Sdn Bhd & Anor v. Atlas Corporation Sdn Bhd [2003] 6 CLJ 344 HC (**refd**) C

Legislation referred to:

Companies Act 1965, ss. 4, 33(1), 122(1), 132
 Employees Provident Fund Act 1991, ss. 40, 41, 42, 43, 46, 65, 67
 Evidence Act 1950, ss. 101, 102, 103

Other referred to:

Pullock & Mulia, *Indian Contract and Specific Relief Acts*, 10th edn, p 187

For the plaintiff - Haryaty Hashim; *M/s Ravi Aida & Partners*

For the 2nd defendant - Raja Navaratnam; *M/s Rajan Navaratnam*

Reported by Suhainah Wahiduddin

JUDGMENT**Ramly Ali J:**

[1] These grounds of judgment are in respect of the plaintiff's claim against the 2nd defendant (*vide* encl. 1).

[2] The plaintiff had filed this suit on 1 June 2007 stating:

- (a) that the plaintiff was at all material times a non-executive director of the 1st defendant;
- (b) that the 2nd defendant is a *de facto* director of the 1st defendant;
- (c) that the 1st and 2nd defendant had *vide* letter dated 28 August 2006 misrepresented to the plaintiff that the actual balance owing for the Employee Provident Fund ("EPF") as at the date of the said letter was RM160;

- A (d) that the 1st and 2nd defendant had not taken the appropriate steps/measures to pay the EPF contributions for the employees of the 1st defendant; and
- B (e) as a result of the said misrepresentation the plaintiff's good name and reputation had been tarnished.

C The plaintiff now comes before this court seeking declarations, amongst others and in particular, against the 1st and 2nd defendant for damages as a result for the misrepresentation and for failure to pay EPF contributions for the employees of the 1st defendant.

- D [3] The basis of the plaintiff's claim herein is that, at all material times he was just a non-executive director of the 1st defendant and as such he was not responsible to pay EPF contributions for the employees of the 1st defendant.

Is The Plaintiff A Director Or Non-executive Director Of The 1st Defendant

- E [4] Based on the whole evidence, the court is satisfied that the plaintiff was in fact an in law a director of the 1st defendant in accordance with the definition of the word "director" in s. 4 as well as s. 122 of the Companies Act 1965 (CA).

- F [5] Under s. 4, "director" includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.

- G [6] Section 122(1), provides *inter alia* that every company shall have at least two directors who each has his principal or only place of residence within Malaysia. A director of company shall be a natural person of full age.

- H [7] In coming to the above conclusion, that the plaintiff was at all material times a director (not a non-executive director) of the 1st defendant, the court refers to the followings:

- I (a) Resolution dated 11 April 2003 appointing the plaintiff as a director and not as a non-executive director;

- (b) From 49 (in accordance with the CA, 1965 being register of directors) dated 4 April 2003; A
- (c) Clause 75 of 1st defendant's Memorandum and Articles of Association; B
- (d) Letters dated 21 February 2003 & 14 March 2003 by the plaintiff firm of solicitors whom the plaintiff is a partner seeking to convene an Extraordinary General Meeting for the appointment of directors; C
- (e) Notice to convene an Extraordinary General Meeting dated 20 March 2003 to appoint the plaintiff as a director and not as non-executive director; and D
- (f) There is no contract or form of document that the plaintiff is a non-executive director. E

[8] From the above mentioned documentary evidence it is axiomatic that the plaintiff had voluntarily offered himself to be a director of the 1st defendant and had even procured steps to push/expedite for an Extraordinary General Meeting so as to enable the plaintiff to be appointed to the board of directors. There is not a shred of evidence adduced by the plaintiff to show that the plaintiff was appointed as a non-executive director in the 1st defendant company to protect the interest of the 2nd defendant. F

[9] This court should take judicial notice that the plaintiff had even filed a civil suit against the 2nd defendant for non-payment of Director's Fees and other expenses in his capacity as a director of the 1st defendant company *vide* Kuala Lumpur High Court Suit No. S7-22-913-2007. Hence if the plaintiff is to be remunerated in his capacity as a director, then it is only fair and reasonable for him to assume and undertake the responsibilities attached to the said position, as a director of the 1st defendant company. G

[10] Even, assuming that the plaintiff is a non-executive director, nevertheless he is still a director in the eyes of the law and his roles and duties are governed by the Companies Act 1965, (CA) in particular, s. 132. Furthermore a non-executive director is entrusted to look after the affairs of the company and to keep a close watch on the company's managers and other directors in H

A order to safeguard the investment of shareholders. Even if the plaintiff is a nominee of the 2nd defendant, then the plaintiff is in fact a trustee for his principal interest and the plaintiff by failing to ensure that the EPF contributions had been diligently paid had breached his fiduciary duties towards his principal, being the 2nd
B defendant. This, the plaintiff had failed to do as clearly evident from his affidavit in support that he had neither been involved nor had any knowledge of the company's affairs.

C [11] In the case of *Lembaga Kemajuan Wang Simpanan Pekerja v. Rubfil Sdn Bhd & Ors* [2005] 1 LNS 369 the late Abdul Wahab Said Ahmad J held:

D The directors be they as nominees, sleeping directors or non active directors owe a duty to see the company's employees EPF be protected. As directors of the company whether active, nominee, sleeping or non-active director all of them are jointly and severally liable.

E [12] It is trite law that the affairs of the company, as a separate legal entity, are managed by the directors of the company. The directors of the company are appointed either by the shareholders pursuant to the company's Memorandum and Articles of Association and upon such appointment the directors are vested with power and control over the company's affairs. (see: *Salomon v. A Salomon & Co Ltd* [1897] AC 22 and *Abdul Mohd Khalid Hj Ali & Ors v. Dato' Hj Mustapha Kamal & Anor* [2003] 5 CLJ 85).
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G [13] A director not only owes a fiduciary duty to the company but also a duty to act in the company's best interest. These fiduciary duties are owed by the director to the company as a separate legal entity, rather than to the shareholder in their individual capacity. It cannot be denied that equitable principles are imposed by the court. In this regard, s. 132, CA 1965 is referred hereto. The mere fact that the plaintiff had accepted the position of a director impliedly warrants that he accepts the responsibilities together with its fiduciary and statutory duties. The
H plaintiff as a director must exercise reasonable diligence in performing his duties whilst in office. In the case of *Re Forest of Dean Coal Mining Corp Co* [1879] 10 Ch D 450 Jessel MR stated:

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Directors are bound, no doubt, to use reasonable diligence having regard to their position, though probably an ordinary director, who only attends at the board occasionally, cannot be expected to devote as much time and attention to the business as the sole managing partner of an ordinary partnership, but they are bound to use fair and reasonable diligence in the management of the company's affairs, and to act honestly.

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[14] Hence, even if the plaintiff had held out himself as a non-executive and nominee director to the 2nd defendant, it is still the plaintiff's responsibility and fiduciary duty to ensure payments of EPF contributions and to exercise reasonable diligence, whether he is actually involved or not with the 1st defendant's affairs as he has a statutory duty to do so. To allow the plaintiff to shield himself by asserting that he is not responsible to act upon his statutory duties and to monitor and/or ensure the payment of EPF contribution whilst in office will most certainly lead to a flood of cases of non-payment of EPF contributions or other statutory payments such as corporate taxes as directors will then just shift the burden of remittances to shareholders and other persons to escape any liability or even prosecution from the authorities.

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[15] A company incorporated under the Companies Act 1965 has a separate legal entity distinct from that of its members and the company can only act through its directors or officers who have been given authority to act. It is trite law that the assets and liabilities of the company rests with the company and does not extend to the shareholders. If the company breaches its contracts or incurs legal liabilities, the company must be sued and not its members.

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Is The 2nd Defendant A *De Facto* Or Shadow Director Of The 1st Defendant

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[16] The plaintiff in its originating summons and affidavit in support (encl. 2) had alleged that the 2nd defendant is a *de facto* director whilst in their 1st affidavit in reply (encl. 9) and 2nd affidavit in reply (encl. 12) the plaintiff alleged that the 2nd defendant is a *de facto* and shadow director of the 1st defendant. Even in the plaintiff's submissions, they had elected to refer to the 2nd defendant as a *de facto*/shadow director. With these assertions, it remains questionable as to what role the 2nd defendant did in fact undertake as there is a difference between a *de facto* director with that of a shadow director.

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- A [17] Millett J in the case of *Re Hydrodom (Corby) Ltd* [1994] 2 BCLC 180 had laid down the differences between a *de facto* director and a shadow director in the following passages:

B A *de facto* director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.

D A *de facto* director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a Defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether *de facto* or *de jure*; (2) that the Defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behavior in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.

- G [18] In the case of *Re Lo-Line Electric Motors Ltd* [1988] BCLC 698, Millet J held:

H In order to establish that a person was a "shadow director" as defined in s. 22(5) of the 1986 Act there had to be proof of a pattern of conduct in which a *de jure* director of a company was accustomed to act on the instructions or directions of the alleged shadow director and in order to establish that a person was a *de facto* director it was necessary to show that he undertook functions in relation to the company which could properly be discharged only by a director. The test for a shadow director was not satisfied if all that could be shown was that a *de jure* director acted on the instructions or direction of the alleged shadow director in relation to one event at the end of the company's life.

[19] In *Re Unisoft Group Ltd. (No. 3)* [1994] BCLC 609 (at p. 620) the court held: A

In relation to a company “shadow director” means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However, a person is not deemed a shadow director by reason only that the directors on advice given by him in a professional capacity. In my view, there can be no way in which the acts of any one of the several directors of a company in complying with the directions of an outsider could constitute that outsider a shadow director of that company. Of course, if the board of the company be one person only and that person is a ‘cat’s paw’ for an outsider, the outsider may be the shadow director of the company. But in a case such as this, with multi-member board, unless the whole of the board, or at the very least a governing majority of it—in my belief whole, but I need not exclude a governing majority – are accustomed to act on the directions of an outsider, such an outsider cannot be a shadow director. Further, there must be as I say, more than one act and a course of conduct. B C D

(see also: *Re a Company (No. 005009 of 1987) ex-parte Copp and another* [1989] BCLC 13). E

[20] In another case, *Secretary of State for Trade and Industry v. Deverell and another* [2001] Ch 340, the court held as follows:

In all cases in which it is alleged that a person is a *de facto* director it must be shown that (1) the person was involved in the company’s major financial decisions and (2) that the person performed functions that were consistent only with acting as a director and could not have been performed by a person in a managerial or some other role below board level. F

[21] In the present case, the plaintiff’s allegations that the 2nd defendant was a *de facto* or shadow director of the 1st defendant are based on the following documents: G

- (a) Minutes of Extraordinary Meeting held 4 April 2003 wherein the 2nd defendant had allegedly chaired the said meeting. It is pertinent to note that the said minutes were never signed by the 2nd defendant and to date no evidence has been adduced to the contrary by the plaintiff despite being challenged by the 2nd defendant; H

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- A (b) Letter from Syarikat Pesaka Antah Sdn Bhd discharging Messrs Ravi, Beltran & Co (acting as a firm) from acting as solicitors and not the plaintiff, signed by the 2nd defendant in his capacity as Executive Director of Syarikat Pesaka Antah and not defendant whatsoever in the said letter and therefore
- B the said letter has no bearing/basis in this case by any measure.
- (c) Deed of settlement of agreement dated 22 April 2005 between the 1st defendant and 2nd defendant.
- C [22] The averments made by the plaintiff and the documents exhibited herein do not in any way show that the 2nd defendant was in fact and in law a *de facto* or a shadow director. This finding derives its strength from the followings:
- D (a) paragraph 8 of the plaintiff's affidavit in support states that he was appointed to look after the 2nd defendant's interest. There is no averment whatsoever that the 2nd defendant had all along instructed the plaintiff to carry out his functions;
- E (b) the plaintiff by his own averments in his affidavit in support had stated that he was never involved in the company. Hence, he had not carried out any instructions or directions from the 2nd defendant thereby fortifying the fact that the 2nd defendant is not a *de facto* director;
- F (c) there is not a shred of evidence adduced that there is a pattern that the 2nd defendant is a *de facto* or a shadow director;
- G (d) the circular resolution in exh. "P2" of the plaintiff's affidavit in support merely states that the plaintiff and, one, Narayan Lakshimi Anthony are to protect the interest of the 2nd defendant. This does not show or prove that the 2nd defendant is a *de facto* or a shadow director;
- H (e) the plaintiff had failed to act diligently and was in fact negligent in not looking after the 2nd defendant's interest despite having voluntarily undertaking to look after the 2nd defendant's interest;
- I (f) that one Mr. Khoo Swee Tiong was at all material times in charge of the 1st defendant's affairs; and

(g) Affidavit sworn by the said Narayan Lakshmi Anthony affirmed on 3 March 2008 where the averment of the deponent were that the 2nd defendant was never involved in the management and affairs of the company, were never specifically replied thereto by the plaintiff.

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[23] The plaintiff had not adduced any evidence to show that the 2nd defendant had played a controlling or commanding role in the 1st defendant company, thereby failing to discharge the burden of proof lies on him. Burden of proof as contained in s. 101 of the Evidence Act 1950 of establishing a case rests throughout the proceedings on the party who assert the affirmative of the issue. Under ss. 102 and 103 of the same Act, if the party with whom the onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or give evidence which is not sufficient, such party must fail.

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[24] In the present case the plaintiff had failed to plead, state and prove the following:

(a) that the 2nd defendant had negotiated for and on behalf of the company;

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(b) that the 2nd defendant played in a prominent role in the company;

(c) that the 2nd defendant was responsible for the company's affairs and management; and

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(d) most importantly that the 2nd defendant had "bossed" the directors who customarily submitted to his requirements.

Is The 2nd Defendant, The Chairman Of The 1st Defendant

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[25] At one stage of the submissions, the plaintiff raised the issue that the 2nd defendant was the Chairman of the 1st defendant company in order to show the role played by the 2nd defendant in the 1st defendant. In this case, the 2nd defendant was, based on the plaintiff's own evidence and exhibit, sat as Chairman to chair their meetings, on the invitation of the 1st defendant's board of directors in tandem with the company's Memorandum and Articles of Association.

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- A [26] It is pertinent to note that pursuant to art. 96 of the company's Memorandum and Articles of Association, the board of directors shall elect a chairman at their meetings. Hence, the 2nd defendant was in fact only elected to chair the meeting on the invitation and appointment from the board of directors. A single
- B meeting if chaired by the 2nd defendant does not automatically make the 2nd defendant a Chairman in perpetuity. A Chairman of a meeting is different from a Chairman of the company.

- C [27] It is also trite law, that the acts and appointments of the company is governed by the company's Memorandum and Articles of Association and in the present case a perusal of the same does only provide for the appointment of a Chairman at board meetings. Hence, any other assertion or acts undertaken which are not in accordance with the company's Memorandum and Articles
- D of Association is void and unenforceable and has no legal basis as the said Memorandum and Articles of Association constitute a contract between the company and its members as stated in s. 33(1), CA, 1965.

E **Issue Of Misrepresentation**

- [28] It is the plaintiff's assertion, that the 2nd defendant together with the 1st defendant had misrepresented to the plaintiff that the EPF contributions were in fact paid when they were not done accordingly.

- F [29] In order to prove misrepresentation the plaintiff must show that the 2nd defendant had represented a statement of fact, such being a positive assertion that the 2nd defendant believes was not true. (see: *Tay Tho Bok & Anor v. Segar Oil Palm Estate Sdn Bhd*
- G [1996] 1 LNS 60.

- [30] Misrepresentation means a false representation of a statement or assertion, made by one party to the other. A mere statement of opinion proved to be unfounded, is not misrepresentation. Referring to Pullock & Mulia, "*Indian Contract and Specific Relief Acts*" 10th edn at p 187, the leading authors had stated:
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- I Statements of opinion or intention may not amount to representations where the maker of the statement had no real knowledge or was simply passing on information ...

[31] The Court of Appeal in *Sim Thong Realty Sdn Bhd v. The Kim Dar* [2003] 3 CLJ 227 held: A

Now the elements of an actionable misrepresentation are well settled. They are set out as follows in *Professor Mckendrick's Contract Law* (3rd Edition), a leading work on the subject: B

A misrepresentation may be defined as an unambiguous, false statement of fact which is addressed to the party misled and which materially induces the contract ... The first is that the representation must be an unambiguous false statement of fact, the second is that it must be addressed to the party misled and the third is that it must be a material inducement to entry into the contract. C

[32] It is reiterated here, that the 2nd defendant had clearly stated that he was merely reiterating what was advised to him by Khoo Swee Tiong and hence was not making any representation whatsoever. He was merely passing on the information that he has obtained from Khoo Swee Tiong to the plaintiff. That does not amount to misrepresentation. D

[33] In the case of *Hasnul bin Abdul Hadi v. Bulat bin Mohamed & Anor* [1977] 3 LNS 2, His Lordship Ibrahim J quoted Gatlley on *Libel and Slander*, 7th edn as follows: E

... Words are normally construed in their natural and ordinary meaning, i.e. in the meaning in which reasonable men of ordinary intelligence, with the ordinary man's general knowledge and experience of worldly affairs, would likely to understand them. The natural and ordinary meaning may also 'include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words' F
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[34] In the letter dated 28 August 2006 (exh. "P6", encl. 2) the 2nd defendant had expressly stated that his information was based on the representation made by the director of the 1st defendant, Mr. Khoo Swee Tiong to him. H

[35] The relevant paragraph of the said letter dated 28 August 2006 from the 2nd defendant to the plaintiff is reproduced below: I

- A With reference to the letter of demand from Messrs Ariffin Raj De Silva & Associates which was enclosed with your letter, I am advised by Khoo Swee Tiong that the actual balance outstanding is RM160.00 which is confirmed in a document from EPF and attached herewith for your records. This suggests that there may be an error on the part of EPF in computing the amount owed and therefore, the letter of demand in question may not have stated the correct amount.
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- [36] In applying its natural and ordinary meaning, it would be that the 2nd defendant was not making any representation whatsoever regarding the outstanding balance of the EPF contributions and this was clearly understood by the plaintiff, more so when the plaintiff is an advocate and solicitor. In addition, the plaintiff *vide* his solicitors letter dated 19 September 2006 (exh. "P7", encl. 2) had accepted that the fact that the 2nd defendant "was advised by Khoo Swee Tiong" and it was not the 2nd defendant that made any representation on his own accord as to any fact, opinion or even expression. Moreover, the 2nd defendant also cannot be said to have misrepresented *vide* his letter dated 28 August 2008 that the sum owing was RM160 in respect of the EPF contributions as the EPF *vide* letter dated 4 April 2006 (exh. "P6", encl. 2) had confirmed that RM160 was in fact the true and accurate sum outstanding.
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- [37] In addition to the above, the plaintiff, as an advocate and solicitor and a director of the company at the material time could have made the necessary inquiry with the EPF so as to ascertain the actual EPF contributions that were outstanding. In the Singapore Court of Appeal case of *Quah Poh Hoe Peter v. Probo Pacific Leasing Pte Ltd* [1993] 1 SLR 14, it was held, *inter alia* (on an allegation by the plaintiff that the first defendant had misrepresented the existence of a company), that whether or not the entity concerned was incorporated as a company under the Companies Act is a fact which could be objectively established by making a simple search at the Registry of Companies.
- F
- G

- H [38] In *Travelsight (M) Sdn Bhd & Anor v. Atlas Corporation Sdn Bhd* [2003] 6 CLJ 344, Abdul Malik Ishak J (now JCA) held:

- I In simple language, a misrepresentation is a representation that is untrue. It is a false statement made by one party to the contract to the other, before, or at the time of contracting, on which that other party relied on in contracting.

[39] Applying the above principle to the facts of this case, it is clear that the 2nd defendant had not made any representation (as alleged by the plaintiff) let alone misrepresentation. The plaintiff had not pleaded the following: A

- (h) whether the Plaintiff had relied on the 2nd Defendant's letter; B
- (i) whether the Plaintiff was induced to enter any contract as a result of the said letter;
- (j) whether the 2nd Defendant had made a fraudulent, negligent or innocent misrepresentation; and C
- (k) whether the Plaintiff had suffered losses to entitle him to any damages.

[40] In the Court of Appeal case of *Sim Thong Realty Sdn Bhd v. The Kim Dar* [2003] 3 CLJ 227 Gopal Sri Ram JCA delivering the judgment of the court held: D

As a general rule, the burden is on the representee to show that the misrepresentation induced him to enter into contract.

Further down his Lordship held: E

Now, it is trite that the expression "misrepresentation" is merely deceptive of a false pre-contractual statement that induces a contract or other transaction ... Put it another way, a misrepresentation is innocent "where the representor believes his assertion to be true and consequently has no intention of deceiving the representee" F

And later on, the court also held:

In the case of an innocent misrepresentation, our law is the same as that of England before the passing of the Misrepresentation Act 1967 in that country. A representee who has been induced by an innocent representation may sue for rescission and consequent restitution; but he may not recover damages. This principle is based on the historical antecedent that a Court of Equity will only decree specific relief but not damages, the latter being the sole relief that Courts of Common Law will grant. G
H

[41] In the present case, the court finds that the plaintiff had failed to specify and plead clearly whether the 2nd defendant had made a fraudulent, negligent or innocent misrepresentation. To succeed in establishing fraudulent misrepresentation, it is incumbent I

A on the plaintiff to prove the same beyond reasonable doubt, such prove which has not been forthcoming or even present by any standards based on the affidavits filed herein.

B [42] In the case of *Lee Cheong Fah v. Soo Man Yoh* [1996] 2 BLJ 356, Abdul Malik Ishak J (now JCA) held:

C In my judgment, to succeed on the ground of fraud and/or fraudulent misrepresentation, the Defendant must prove beyond reasonable doubt that there must be clear, cogent, direct and unequivocal evidence of both fraud and/or fraudulent misrepresentation. Unless there was such evidence, the Court was not in a position to make a finding as to fraud or, for that matter, fraudulent misrepresentation. One must be clear in approaching the issue of fraud in that fraud is not a matter of inference or mere simple deduction.

D [43] In the case of *Low Keang Guan v. Sip Heap Lee-Marubeni Sdn Bhd* [2005] 1 LNS 289, again Abdul Malik Ishak J (now JCA) held:

E In my considered view, damages, subject to proper pleading and proof, can be claimed for breach of contract. But, in the absence of fraud or negligence, there can be no damages for innocent misrepresentation. If neither negligence nor fraud is alleged with the relevant particulars, just like the present case at hand, then the alleged misrepresentation is an innocent misrepresentation and it does not attract any award of damages. In the present case, the Plaintiff's amended statement of claim, similarly alleges neither fraud nor negligence.

G [44] The 2nd defendant in the present case in fact did not make any representation whatsoever but merely communicated to the plaintiff as to what was informed to him by Khoo Swee Tiong. Whilst the plaintiff had alleged misrepresentation, it had not been stated as to what extent the plaintiff had relied and acted on the said statement and suffered losses as a result of the said alleged statement. Hence, the plaintiff is not entitled to damages.

H **Payment Of EPF Contributions**

I [45] The right of bringing an action against the plaintiff was initiated by the 3rd defendant (EPF) and was not as result of the 2nd defendant's actions and/or representation. Sections 65 and 67 of the Employees Provident Fund Act 1991 clearly stipulates that the right is with the EPF Board. Hence whatever action brought by the EPF under its mistaken belief cannot be put on the

shoulders of the 2nd defendant as the 2nd defendant has no right by any measure to direct and control the actions undertaken by the EPF. Furthermore s. 46 of the same Act provides for the EPF to initiate action against the plaintiff as the plaintiff is in fact a director, by whatever name he is called, of the 1st defendant. The plaintiff in initiating and accepting his appointment as a director of the 1st defendant has to be responsible for his statutory obligations. If the plaintiff was not willing to carry out his fiduciary and statutory obligations, he should not have accepted his position as a director of the 1st defendant.

[46] In the case of *Tang Kwor Harm & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja* [2005] 8 CLJ 676 Low Hop Bing J (now JCA) held that pursuant to s. 46, of the EPF Act 1991, the directors of a company at the material time are liable for the contributions and not anyone else such as shareholders.

[47] Sections 40, 41, 42 & 43 of the Employees Provident Fund Act 1991 stipulates that the responsibility of EPF contributions is on the employer, in this case being the company. Hence, the plaintiff's assertion and demand that the 2nd defendant should pay the EPF contribution is without basis and wholly unsustainable. The 2nd defendant is only a shareholder and hence bears no responsibility towards payment of EPF contributions. It is pertinent to note that the language contained in the said Act is neither ambiguous nor absurd and hence a strict and literal interpretation is required.

[48] It is trite law that a company incorporated under the Companies Act 1965 is a separate legal entity, distinct from its members and officers. Since the onus of EPF payments is on the company (the 1st defendant) and the 2nd defendant cannot be made liable for payments of EPF contributions let alone the responsibility to ensure payments for the same as that would tantamount to interfering with the company's affairs. Referring to the case of *Law Kam Loy & Anor v. Boltex Sdn Bhd & 5 Ors* [2005] 3 CLJ 355, Gopal Sri Ram JCA, went on to quote the words of Lord Halsbury in the case of *Salomon v. A Salomon & Co Ltd* [1897] AC 22:

... that once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

- A [49] Section 46 of the Employees Provident Fund Act 1991 clearly provides that the directors of a company are jointly and severally liable for contributions. Whilst the plaintiff alleges that he is a non-executive director (though no evidence whatsoever has been adduced), s. 4 of the Companies Act 1965 expressly states
- B “director’ includes any person occupying the position of director of a corporation by whatever name called ...”

It is axiomatic that the plaintiff has a statutory responsibility by virtue of his office to ensure if not inquire if the 1st defendant had in fact paid the EPF contributions.

C

[50] In the case of *Teoh Peng Phe v. Wan & Co* [2001] 5 CLJ 222, Kang Hwee Gee J held:

- D A director owes a fiduciary duty to act honestly in the interest of the company. This principle is inscribed in s. 132(1) of the Act which states that:

A Director shall at all times act honestly and use reasonable diligence in the discharge of his office.

- E [51] In *Electro Cad Australia Pty Ltd & Ors v. Mejati RCS Sdn Bhd & Ors* [1998] 3 CLJ Supp 196, Kamalanathan Ratnam J (as he then was) held:

- F It is my judgment that the duties of a director are those fiduciary duties owed by senior officials of the company and as such are higher than those owed by employees and managers. This is because a director is not an employee but is the alter ego of the company and as such should be placed in the category of employers and not a employees. Generally, the duty placed on director is a duty of fidelity and good faith based on a relationship
- G founded on an element of trust.

[52] In *Ng Pak Cheong v. Global insurance Co Sdn Bhd* [1995] 1 CLJ 223, Mohamed Dzaiddin FCJ in delivering the judgment of the Apex Court held:

- H In *Australian Growth Resources Corporation Pty Ltd v. Van Reesma* [1988] 13 ACLR 261, it was observed (at p 268):

- I The relationship of a director to the company is fiduciary in character. The primary consequence of this principle is that a director is bound to exercise the powers and discretions conferred upon him bona fide in the interests of and for the benefit of the company as a whole ...

[53] It is pertinent to note that at all material times the plaintiff had failed to make any inquiries and/or to take any reasonable steps to ensure the said EPF contributions during his tenure (and even thereafter) as director thereby breaching his fiduciary duties. On one hand the plaintiff claims that he was appointed to look after the interest of the 2nd defendant and has to date filed a claim for *vide* Kuala Lumpur High Court Suit No. S7-22-913-2007 for directors remuneration yet on the other hand he contends that he was never involved with the 1st defendant in any respect whatsoever. If the plaintiff was never involved, then it is highly suspicious and questionable as to his assertion that he was appointed to protect the 2nd defendant's interest and also as to why he should be paid director's remuneration, in this regard, that plausibility must be tested against veracity.

[54] The plaintiff owed a fiduciary duty to protect the interest of the company and in failing to do so had breached his duty of care towards the 1st defendant which he had owed in his capacity as director by failing to even inquire, ascertain and ensure statutory payments.

[55] In the recent Singapore Court of Appeal case of Planassure Pac formerly known as *Patrick Lee Pac v. Gaelic Inns Pte Ltd* [2007] SGCA 41 [2007] 4 SLR 513, the highest Court in Singapore held:

... The nub of the issue is whether they remained under a duty to take positive steps to ensure that the accounts were in order (at least on their face), despite their designation as non-executive directors. This question ought to be answered in the affirmative. As pointed out by the Court in *Vita Health Laboratories Pte Ltd v. Pang Seng Meng* [2004] 4 SLR 162, every director of a company, regardless of whether he has **an executive or non-executive** designation, has fiduciary duties and legal responsibilities to his company.

Thus, the mere fact that Crowhurst, Lew and Shaw were non-executive directors of the material time and took a backseat in the management of the company did not exempt them from the need to exercise a modest level of scrutiny as to the goings-on in the Respondent.

A Further on the Appeals Court held:

A director cannot now be viewed as mere sentinel who may occasionally doze off at his post. Directors are officers who must remain alert and watchful at the helm. Directors ought to have an inquiring, though not necessarily suspicious, mind in discharging their supervisory function.

B

[56] In the case of *Re Barings plc (No. 5)* [2000] 1 BCLC 523, the English Court at Appeal had held as follows:

- C (i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as director.
- D (ii) The exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated function.

Is The Plaintiff Entitled To Damages

- E [57] The plaintiff whilst claiming for damages for loss of reputation had failed to specify as to what damages is being sought. Furthermore the plaintiff had not demonstrated or adduced any proof to this court as to how the plaintiff's reputation had been affected as a result of the suit or action brought about wholly by the 3rd defendant (EPF) own initiation. Further, the plaintiff had failed to adduce any evidence as to how he had suffered any pecuniary loss. The plaintiff had also failed to show, put forward evidence or even indicate the difference between his present reputation and that of his prior to the said suit commenced by the 3rd defendant (EPF) against him.

G

[58] In the case of *CCA Holdings Ltd v. Palm Resort Bhd* [1998] 4 CLJ 440 James Foong J (now JCA) held:

- H Under the common law, the Courts have denied the granting of damages for loss of credibility and reputation.

- I [59] It is also pertinent to note that the 3rd defendant (EPF) had withdrawn the said suit or action against the plaintiff and further the plaintiff had failed to prove any loss as a result of the said suit.

Conclusion

[60] On the above considerations the court rules that the plaintiff has failed to prove his claim against the 2nd defendant. Therefore, the plaintiff's claim against the 2nd defendant is dismissed with costs, to be paid by the plaintiff to the 2nd defendant.

A**B****C****D****E****F****G****H****I**